

No. 12406

United States
Court of Appeals
for the Ninth Circuit.

CLARK SQUIRE, Collector of Internal Revenue,
Appellant,

vs.

SUMNER RHUBARB GROWERS' ASSOCIA-
TION, a Cooperative Agricultural Corporation,
Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court,
Western District of Washington,
Southern Division.

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In the District Court of the United States for
the Western District of Washington, Southern
Division

Number 1157

SUMNER RHUBARB GROWERS' ASSOCIA-
TION,

Plaintiff,

vs.

CLARK SQUIRE, Collector Internal Revenue,
Defendant.

Transcript of proceedings had before the Honor-
able Charles H. Leavy, United States District
Judge, in the above-entitled and numbered cause
in the above-entitled court, on the 16th day of May,
1949, at Tacoma, Washington.

Appearances:

JOHN W. FISHBURNE, ESQ.,
Tacoma, Washington,
appeared for the Plaintiff;

THOMAS R. WINTER, ESQ.,
Assistant United States Attorney,
appeared for the Defendant.

PROCEEDINGS

The Court: Now, Docket 1157, Sumner Rhubarb
Growers' Association vs. Clark Squire.

Mr. Fishburne: I had hoped to submit this and
obtain a pre-trial order on it but the Government

had a general denial in and it was impossible for me to do that. I am sorry that we haven't done it. I still think it could be done if Mr. Winter and I would get together on it.

The Court: The amounts involved here are very small.

Mr. Fishburne: Very small, yes, sir. The Sumner Rhubarb Growers' Association is a cooperative and the Government has admitted that certain of the employees are exempt from the Social Security tax. But the point, as I see it now, is whether or not—it is purely and simply whether—the persons who work in the office, the manager and those persons who are not actually doing the labor—are exempt also. That is the only question that is before this Court. The Plaintiff takes the position that the Corporation is exempt under 101, Title 26, Section 101 of the Code, and also sub-section (1) and sub-section (12)—that we come under both of those sub-sections. The Government takes the position that only those persons actually doing agricultural work under sub-section (1) of Section 101 are exempt and that we, therefore, have to pay the Social Security tax on [2*] those persons who are not doing actual manual labor, defined as agricultural labor. Is that correct, Mr. Winter?

Mr. Winter: No. I don't think I follow counsel.

The Court: Well, the substance of Counsel's statement is that under the laws and regulations the

* Page numbering appearing at top of page of original Reporter's Transcript.

employees of the cooperative are exempt excepting the office people.

Mr. Winter: No. The point is this, your Honor: That under the Social Security Act, certain organizations are exempt entirely; hospitals, eleemosynary corporations, labor or agricultural organizations such as the A. F. of L., the Grange, or some other organizations which are non-profit organizations and merely associations for a purpose. However, there is also exempt from income tax farmers' cooperatives, under Section 101 (12) — from 101 (12) — farmers, fruit growers or like associations organized and operating on a cooperative basis for the purpose of marketing the products of members or other producers and turning back to them the proceeds of the sale less marketing expense.

It seems to me that they have raised two issues here. If the Court were considering an organization under 101 (1), no matter what their employees, no matter what their employment or what they did, they wouldn't be under the Social Security Act. The Government would have no case. However, if they are under 101 (12) they are under the Social [3] Security Act. However, the Act goes further and exempts agricultural labor. Then it becomes a question as to whether or not they come under the exemptions of the agricultural labor of the Social Security Act or whether such employees are not specifically exempt as agricultural labor. There have been a number of cases on that point. One court held that dairy workers—I think your Honor re-

viewed those that held that some of the employees which were building fences in the nature of carpentry work for these dairies were exempt as being in the production of milk or the production of agriculture. It is the Government's position that while this is a farmers' organization, the wages paid to these individuals—there are three individuals who were the bookkeeper—I forget—I am not familiar—but they were office help and not in the packing or business of producing. That is, they weren't engaged in maintenance of equipment in the performance of a major part of the farm work. The services here were not performed on a farm or for a farmer. So, only Section 1426 (4) can apply. It refers to services as handling and says nothing of maintenance of equipment and it is our position that the bookkeeper is not handling the fruit. He is not handling the packing of the material and, therefore, not exempt.

The Court: Do you concede that the concern of this nature, operating to the extent that this one did, has [4] to have a bookkeeper?

Mr. Winter: Yes, your Honor. They had to keep books and maintain records. There is no question about that. They were operating in the nature of a business. There is no question about that.

The Court: I am wondering if we can't now have an oral stipulation that will cover pretty much the question of fact.

Mr. Fishburne: I believe so; yes, sir.

The Court: There should have been a pre-trial

conference order. Can it be stipulated that the Plaintiff is a cooperative agricultural corporation, Mr. Winter?

Mr. Winter: Your Honor, I don't know. I assume that is a fact. They file claims for exemptions and the Commissioner ruled on their exemptions. I don't have them. At the time this case was started, the only information I had——

The Court: That is the reason we should have had a pre-trial conference.

Mr. Winter: I suggested to Counsel that he prepare a proposed stipulation and I didn't hear from him.

Mr. Fishburne: I looked at his Answer and he denied that we were a corporation.

The Court: The fact that you were a co-op could have been submitted and agreed to. [5]

Mr. Winter: The last information I have is that the Commissioner has now under consideration the question of Plaintiff's exemptions under Sections 101 (1) and 101 (12) of the Internal Revenue Code.

The Court: Is that 28 U. S. C.?

Mr. Winter: 26, sir.

The Court: 26?

Mr. Winter: I have it right here. You see, the claim for refund attached to their claim says we claim income tax exemptions under section 101 as well as section 101 (12). But, we certainly do not concede that they are an agricultural organization exempt under 101 (1). We can not stipulate to that

and it is my—I think they have claimed exemptions under 101 (12) too.

The Court: Of course, we should settle this matter. Can you agree whether they are an organized agricultural corporation? That should be a matter that you can very quickly determine because the articles of incorporation should be available.

Mr. Fishburne: We have those; yes.

Mr. Winter: From the Commissioner's letter—this office has been unable to give favorable consideration that all services performed are exempt. I can not stipulate that it is exempt under that section of the statute—101 (12).

The Court: You can stipulate very readily as to whether or not they are organized under the laws of the State of Washington as a cooperative agricultural corporation, because that is only a matter of their articles of incorporation.

Mr. Winter: Your Honor, I would like to so do but I have no information on that.

The Court: That is why we have pre-trial conferences. Do you have the articles here?

Mr. Winter: You see, they are claiming under 101 (1). That is their claim and allegation here.

Mr. Fishburne: We have the articles at the office.

The Court: You should have them here.

Mr. Winter: I can say we might be able to get on with it. I might be able to stipulate if they will so testify. I think that they will but I have no information, your Honor.

The Court: That is why we have pre-trial con-

ferences. You can sit at a table and stipulate. If they testify, then a pre-trial on that matter wouldn't serve any purpose.

Mr. Winter: If such a request had been received, I would have sent it to Washington and gotten the file to find out about it.

Mr. Fishburne: I asked you about it by phone.

The Court: Do you have the articles available? The Court will pass upon that issue.

Mr. Fishburne: He has them in the Fidelity Building.

The Court: Let's go to the next point. Defendant admits——

Mr. Winter: I didn't prepare the Answer.

The Court: It admits two and denies two on information and belief. That refers again back to the articles of incorporation.

Mr. Fishburne: Yes; I copied from the articles of incorporation when I put this paragraph in.

The Court: I don't want Mr. Winter to stipulate. You see, you have ignored the Court's request for a pre-trial order so that I am taking the matter up now. We will have to wait for the articles on the first part of 3. Now, the next part. "Plaintiff——" you can stipulate to that, I assume, Mr. Winter.

Mr. Winter: Paragraph?

The Court: That is the second paragraph in paragraph 3.

Mr. Winter: Yes. I am sure that is a fact, your Honor.

The Court: Now then, the next paragraph, beginning with line 8. [8]

Mr. Winter: Beginning with line 8.

The Court: Yes.

Mr. Winter: I have no information on it, your Honor. I don't know whether that is a fact or not.

The Court: All you would need to do without formal proof would be to ask the President, or any other officer, unless you are prepared to deny it.

Mr. Winter: I am not prepared to deny it, your Honor.

The Court: Because these are just simple matters and a failure to prepare a pre-trial order and a failure by your Department to admit simple facts ready of proof defeats the whole purpose of pre-trial orders.

Going to paragraph 4: "The operation of the Sumner Rhubarb Growers'——"

Mr. Winters: We have no proof to the contrary, your Honor.

The Court: But you are not ready to stipulate. You don't feel you have authority?

Mr. Winter: Well, the allegations were denied on information and belief by the Attorney General. They have given me no further information on it.

The Court: The rules of procedure permit that. That is why you are to sit down around your table and hear the story and stipulate facts. If you had your articles [9] here we would save time by having the President put on the stand. The Department, I hope, isn't going to take the arbitrary position that

these simple matters that they are not prepared to controvert will always have to be heard in open court.

Mr. Winter: Well, as I say, your Honor, I realize these are informal matters and I contacted Counsel and asked him to submit a pre-trial stipulation.

The Court: Well, the only way to make your pre-trial order is to sit down at a table and then see what you know is going to be proven and then you stipulate.

Mr. Fishburne: I spent the greater part of the morning trying to figure out the stipulation. He was in Seattle——

The Court: You can't carry through a stipulation in that manner. Very well, as soon as this officer of the Plaintiff corporation gets back with the articles we will take that up. Now, paragraph 5. That is denied. Their claim for exemptions. What is your position in reference to that, Mr. Winter? Taking the first paragraph of it: "During the year 1931——"

Mr. Winter: Our position was that during the year 1931 an exemption under Section 103 (12) of the Internal Revenue Act of 1928 was granted. We admit that but we deny that from October 1, 1942, to June 30, 1946, it was [10] maintained for tax exemption; and, they have never furnished the Commissioner proof of any such claimed exemption.

Mr. Fishburne: Of course, we take the position

that since we might come under sub-section (1) and sub-section (12)—both of them——

The Court: Section 103 (12)——

Mr. Winter: That is a corresponding section to 101, your Honor, in the 1928 Act.

The Court: Well, the number now is what?

Mr. Winter: 101, your Honor. There are some differences but I don't think they are particularly material as to the nature of the defense. There were some added classifications added to the later Acts by Congress.

The Court: Is there any issue here as to whether this claim was timely filed?

Mr. Winter: I don't think so, your Honor.

Mr. Fishburne: They admit that.

Mr. Winter: I think we have admitted that.

The Court: Very well. Is your man here?

Mr. Fishburne: He hasn't come but I can put the President of the organization on.

The Court: Of course, Mr. Winter will stipulate that the articles are as here testified.

Mr. Winter: I will make no objection to the articles [11] and they may go in.

The Court: He hasn't got them here.

Mr. Fishburne: But we can have the President testify what the company does and the assistant manager.

The Court: Very well. You may proceed with your proof. I want to suggest to Counsel for the Government that I want pre-trial conference orders

prepared and you will have to make arrangements to get together and work things out.

Mr. Winter: I appreciate that, your Honor. I might say that I have been so busy. I always try to get counsel to submit it to me. I am sorry we didn't do it in this case, but things just piled up on me.

The Court: Proceed.

Mr. Fishburne: Mr. Goettsch. [12]

A. J. GOETTSCH

called as a witness for and on behalf of the Plaintiff, upon being first duly sworn, testified as follows:

Direct Examination

By Mr. Fishburne:

Q. Give your name, please?

A. A. J. Goettsch.

Q. Where do you live?

A. Sumner, Washington.

Mr. Winter: What was the first name?

The Witness: A. J.

Q. (By Mr. Fishburne): And you are one of the officers of the Sumner Rhubarb Growers' Association?

A. I am a manager of the Sumner Rhubarb Growers' Association.

Q. And how long have you been manager?

A. Since—well, just this season. Since January 1, 1949.

(Testimony of A. J. Goettsch.)

Q. And before that what was your capacity in the Association?

A. Before that, for approximately three years, I was the assistant manager.

Q. And do you hold any other office in the Association? [13]

A. No.

Q. Are you a farmer?

A. No, sir.

Q. As manager of the Association, what have been your duties?

A. Selling rhubarb and purchasing supplies necessary for the packing of hot house and out door rhubarb.

Q. Give the Court the picture of the Association, with reference to these buildings it operates in, and exactly what it does.

A. We have——

The Court: Well, would it be conceded before three years before this date? He said his connection goes back three years.

The Witness: I have been employed by the Summer Rhubarb Growers' Association since 1938. Prior to my appointment as assistant manager I was a clerk.

Mr. Winter: You were a clerk?

The Witness: Yes.

The Court: That puts you back far enough then to cover the period involved here.

Mr. Fishburne: Back to '38. Yes. It is plenty far back.

(Testimony of A. J. Goettsch.)

Mr. Winter: October 1, 1942, to June 30, 1946, is the period involved, isn't it? [14]

Mr. Fishburne: Yes.

Q. (By Mr. Fishburne): So that you have been familiar with the Sumner Rhubarb Growers' Association activities—you have been intimately attached to them—since 1938? A. Yes.

Q. Will you tell the Court as clearly as you can the operation of the Rhubarb Growers' Association? Explain to him the way the buildings are and what type they are.

A. The Sumner Rhubarb Growers' Association operates in a leased building, frame construction, the size of which is, approximately, two hundred feet long and varies from about sixty feet wide to one hundred fifty feet at the other end. This building is used for the purpose of receiving rhubarb from the growers, which is already packed in fifteen pound net boxes, and the rhubarb is brought into the building by truckers, employees which are mostly high school boys who come on after three-thirty in the afternoon and they work until six-thirty or seven loading trucks with rhubarb or cars with rhubarb, sending out express shipments. When this rhubarb is received by the Association in these fifteen pound boxes it is graded at the—on the farms where it is packed by the growers. The Association employees put on a label. The rhubarb is classified in three different grades. Those are fancy, [15]

(Testimony of A. J. Goettsch.)

extra fancy, and choice. Then the distribution is made according to orders, sales orders.

Q. Is there any rhubarb received at the shed or in the building, Association's building, other than rhubarb from members of the organization?

A. None.

Q. All members of the Rhubarb Growers' Association deliver all of their rhubarb to the Association?

A. All of the hot house rhubarb and during the field season they deliver.

Q. I didn't get that.

A. During the outdoor shipping season they deliver practically all their outdoor rhubarb, but after we are through shipping outdoor rhubarb to the East, then, of course, some of the growers sell to local markets.

Q. And the boxes that the rhubarb is packed in, where do the farmers get those?

A. For the convenience of the farmers the Association buys the boxes during the off season and we have them made up so that the grower can get just the number of boxes that he requires, either knocked down or made up.

Q. And is there any other equipment that you acquire — that the Association acquires — for the farmer?

A. None; only what has to do with rhubarb and the shipping of it. [16]

(Testimony of A. J. Goettsch.)

Q. Is the rhubarb packed on the farm or in the shed? A. It is packed by the farmer himself.

Q. It is packed by the farmer himself and graded by the farmer? A. That is right.

Q. On his farm? A. That is right.

Q. And then delivered to the Association?

A. And then delivered to the Association.

Q. Now, what are the periods of—what are the active periods in the Association, for the Association?

A. Well now, this season we received our first hot house rhubarb on the 17th of January and summers we go until now. We will be through on the—next Friday, which will be—20th of May.

Q. From January to May; is that about the season each year?

A. That is about the season each year; yes.

Q. And was that about the season from 1938 up to the present time? A. Yes.

Q. Now, as manager of this organization, what are the duties?

A. The duties are to sell the rhubarb.

Mr. Winter: Let me ask a question. Are those duties in the articles?

The Court: I wouldn't imagine they would be. They might be in the by-laws.

Mr. Fishburne: They are in the by-laws.

Mr. Winter: I would suggest you introduce the by-laws.

(Testimony of A. J. Goettsch.)

The Court: Well, Mr. Fishburne doesn't have either the by-laws or the articles.

Mr. Fishburne: Here. Everything is in this book.

The Court: I don't think there is any use in marking it and placing it in the record. Just take a look at it.

Mr. Fishburne: If I may submit this to Mr. Winter.

Mr. Winter: Let him testify to it. He doesn't need to testify from it.

Mr. Fishburne: You can use the book for what it is worth.

A. (Continuing) Well, the duties of the manager would be the same as any other company's in business.

The Court: Let's go back a little. We are going into matters now that can't be very seriously disputed. Are you familiar with the document you hold in your hand?

The Witness: Yes.

The Court: Do you know what it is? [18]

The Court: What is it?

The Witness: Articles of incorporation and the by-laws of the Company and the minutes of the board meetings from January 31st until 1940, October 8, 1940.

The Court: And it provides for a manager, does it?

The Witness: It does.

(Testimony of A. J. Goettsch.)

The Court: And under the scheme of operation, how do you operate? You are the manager and what are the requisites for membership?

The Witness: The requisites are that only those interested, or who are growing hot house rhubarb are members of the Association.

The Court: And its finances——

The Witness: Well, in order to obtain finances for the expenses which are necessary we make a deduction of twenty cents a box for each box of rhubarb delivered to the Association. Then at the end of the year this deduction is probably greater than the actual expenses of the Association so that the amount over and above deductions is set up as a reserve to the grower, the liability payable to the grower, and the refund to the grower is made the following year based on the boxes that the grower has delivered.

The Court: Then this Association sells and finds the market—their managing officers and employees?

The Witness: Yes.

The Court: And then the proceeds of the resale, how are they distributed?

The Witness: They come back to the Association and we have what we call weekly pools. The growers from that weekly pool are paid on an average of each grade if it is sold by our brokers.

The Court: Do you want to look at these articles?

Mr. Winter: No, sir. I think it is a regular

(Testimony of A. J. Goettsch.)

co-op. That is all I wanted him to testify to. I thought so all the time, your Honor.

The Court: Well, the Court will find as a fact that this is a cooperative and organized under the laws of the State of Washington and has been such from the date shown in these articles.

Mr. Winter: When was it organized?

The Witness: January, 1931.

Mr. Winter: January what?

The Witness: No. April 24, 1930.

Mr. Winter: All right. I would suggest—Counsel, do you have that letter from the Commissioner?

Mr. Fishburne: Yes.

Mr. Winter: I would suggest putting that in evidence.

The Court: And you handle nothing but rhubarb and [20] nothing but the rhubarb grown by your members?

The Witness: That is right.

The Court: And you distribute back to them what you have over expenses and what you place in your reserve fund?

The Witness: That is right.

The Court: I think that boils it down to an issue, as Counsel concedes, that this is a corporation which would be exempt—that it would be a corporation exempt under 101 (1), or do you still maintain—

Mr. Fishburne: We still take the position that, if the exemptions exempt the workers in the organization as agricultural because they are agricul-

(Testimony of A. J. Goettsch.)

tural workers, there is no distinction that under the definition——

The Court: That is what I am trying to get to. If you will stipulate that there is one issue left here of whether or not the office employees are or are not exempt.

Mr. Fishburne: That is it.

Mr. Winter: Yes, sir. We stipulate that that is the sole issue in the case.

The Court: Well, it wasn't when you required proof that it was a cooperative, but that fact has been established.

Mr. Winter: That is right. But, there is the further issue whether it is exempt under 101 (1) or 101 (12). [21]

The Court: I don't care very much which one it is exempt under.

Mr. Winter: But no matter what their employees may be—no matter what their occupations may be—if they are exempt under 101 (1), the Government has no case because the Social Security Act said no Social Security Tax——

The Court: I am rather familiar with that.

Mr. Winter: Here is the statute.

The Clerk: Plaintiff's Exhibit 1 marked.

Mr. Fishburne: Your Honor——

Mr. Winter: It exempts for employment performed—exempts from the income tax under Section 101 (1)—referring to the Internal Revenue Code. Now, if it is only exempt under 101 (12),

(Testimony of A. J. Goettsch.)

then it would be exempt only if the labor performed was agricultural labor within the terms of the act and it is our position that it is not exempt agricultural labor, even though performed for a coop.

Mr. Fishburne: We take issue right there. Assuming what Mr. Winter said is correct, we find that is correct only insofar as income tax and does not apply to the Social Security tax. It applies only with reference to income tax and not Social Security tax.

The Court: Income tax of the individual?

Mr. Fishburne: Of the Association with reference to agricultural labor. [22]

The Court: Does this Association have an income tax?

Mr. Fishburne: No, sir.

Mr. Winter: It has been ruled as exempt under 101 (12) back in '31.

The Court: Let me ask you a few more questions. You have, in your four month's operating season, several packers and truckers and loaders employed?

The Witness: Just truckers and loaders.

The Court: Do you pack and grade these products?

The Witness: No.

The Court: The farmer does that?

The Witness: The farmer does that on his own farm.

(Testimony of A. J. Goettsch.)

The Court: And then do you have selling agents out?

The Witness: No. The rhubarb in the markets—we have a broker in Seattle who goes to the different wholesale houses and picks up the orders and phones them in to us. We ship the rhubarb by railroad express.

The Court: I don't care for you to go into that. Now, how many employees do you have in this freight department work, hauling and loading and shipping out?

The Witness: I believe our maximum this year was twelve. [23]

The Court: During this four month period?

The Witness: Yes.

The Court: Then who else do you have that draws a salary check from the cooperative?

The Witness: Well, myself and the office girl. Mr. McLain who is the treasurer is also the warehouse foreman. He receives his remuneration for being warehouse foreman. And then we have the man that receives our——

The Court: Is he a four month employee or a twelve month?

The Witness: No, he is just less than four months.

The Court: Is he counted as part of your office staff?

The Witness: No. He has nothing to do in the office.

(Testimony of A. J. Goettsch.)

The Court: Are his wages involved in this controversy here?

The Witness: I believe that the wages involved in this controversy are myself and the office girl's.

Mr. Winter: Just the two of them.

The Witness: Just the two.

Mr. Winter: The Assistant Manager too.

Mr. Fishburne: The manager, assistant manager, and the office girl.

Mr. Winter: Yes. [24]

The Court: Well now, do you work twelve months of the year?

The Witness: No.

The Court: The time spent with the rhubarb association is about 5½ months; and the others, the office girl, does she?

The Witness: No, she only works the same.

The Court: You close the establishment, close down, when the rhubarb season is over?

The Witness: That is right.

The Court: And that is a month or two beyond the actual delivery season?

The Witness: Well, we usually try to close up everything by the end of May and then, of course, there are a few reports and things to get out during June, quarterly reports, and she comes back and spends a day or two.

The Court: The Association can't do any other business of any kind excepting handling rhubarb?

(Testimony of A. J. Goettsch.)

The Witness: That is right; and procuring boxes, of course.

The Court: And they keep records of what they handle?

The Witness: That is right.

The Court: Of not only salaries but disbursements of whatever they have? [25]

The Witness: Yes.

The Court: I think that is all.

Mr. Fishburne: For the purpose of the record I can read their purposes into this record.

The Court: No; I don't think it is necessary at all. I think Mr. Winter acknowledged it was a cooperative.

Mr. Winter: That is right.

Mr. Fishburne: I will offer this letter, Plaintiff's Exhibit Number 1, as evidence in this case.

Mr. Winter: No objection.

The Court: It will be admitted.

(Plaintiff's Exhibit Number 1 for identification received in evidence.)

Mr. Fishburne: Do you want to cross-examine?

Mr. Winter: Yes.

Cross-Examination

By Mr. Winter:

Q. You were the manager; and who was the assistant manager?

A. I was the assistant manager and Mr. Matson

(Testimony of A. J. Goettsch.)

was the manager last year and for this season I have been the manager.

Q. Mr. Matson is just one of the growers there?

A. Director now.

Q. Well, you were assistant manager from 1938, I believe? [26]

A. No; 1945.

Q. 1945? A. Yes.

Q. What did you do before that?

A. Clerked in the office prior to 1945.

Q. You mean keeping the books?

A. Keeping the books.

Q. And keeping the tabs on shipments?

A. That is right.

Q. And preparing the payrolls?

A. Well, partly payrolls and——

Q. General office work?

A. General office work.

Q. Now, as manager, do you contact your broker? The Association has brokers that handle the products? A. That is right.

Q. And you contact the brokers for selling the products? A. That is right.

Q. And do you contact the trade in going out and selling yourself any?

A. Just the Eastern trade; contacting the brokers in the East for shipments East.

Q. Is that by correspondence? [27]

A. Telephone and telegram.

Q. Now, what does a member do to get into the Association? Does he pay a fee?

(Testimony of A. J. Goettsch.)

A. He signs a marketing agreement and the membership fee is \$1.00.

Q. Under the marketing agreement he has to sell all of his product? A. All of his hot house.

Q. And after you stop shipping, then he can sell it elsewhere? A. That is right.

Q. What do you do if they sell to somebody else during the——

A. We have never had a case of that kind.

Q. You never found them doing it?

A. No.

Q. And you attempt to get the highest market you can for the product?

A. We attempt to get the highest market we can; yes, sir.

Q. And you pay him eighty per cent of what he has coming and then retain twenty per cent?

A. No. It is twenty cents a box.

Q. Twenty cents a box? A. Yes.

Q. What [28] is a box; what was the——what would be the average price of a box the past couple of years?

A. For the three grades this year they will average \$2.85 extra, \$2.70 fancy, and \$2.10 for a box of choice.

Q. You deduct twenty cents regardless of price?

A. Yes.

Q. Does the grower get the price that his particular rhubarb sells for on a particular day, or the weekly average? A. The weekly average.

(Testimony of A. J. Goettsch.)

Q. If he took in a carload today and got \$3.00 for it and then the market went off to \$2.50, he would only get \$2.50, although you got \$3.00 for his rhubarb?

A. If you sell part at \$3.00 and part at \$2.50, your average would be \$2.75.

Q. Well, he would get the average?

A. Yes.

Q. You don't try to ear-mark a particular shipment? A. No.

Q. And then for this year's crop you pay them next year?

A. Well, we pay them for it over and above the twenty cents a box. The amount—

Q. That you don't use for cost of the Association? A. Yes. [29]

Q. Now, last year's—the surety proceeds, which amounted to eleven thousand dollars were paid—

A. Around the 5th of April this year.

Q. About what percentage of the twenty cents does it cost to operate your Association?

A. Well, figuring on the 1948 charges, it was about between 14 and 15 cents a box cost to operate.

Q. And the other four or five cents is returned to the farmers, prorated? A. That is right.

Q. In other words, he would get back, you would prorate his share depending on the cost and number of boxes which he shipped?

A. Depending on the number of boxes he shipped; yes.

(Testimony of A. J. Goettsch.)

Q. Now, you work as manager. Have you covered your work as manager?

A. Yes; selling and purchasing supplies.

Q. When do you purchase your supplies, in the fall, or off season? A. Yes.

Q. Well, that takes some part of your time?

A. During that time I am employed by another party.

Q. Yes, but you are working and doing that and it takes time? A. Yes. [30]

Q. You have to go around and visit different concerns?

A. It is done mostly by phone from my other position.

Q. What is your other position?

A. Foreman in R. I. McLaughlin Company at Puyallup, Washington, packing berries, cold packing berries.

Q. Then you go over there and cold pack berries?

A. Yes.

Q. Are you manager there?

A. Plant foreman.

Q. How long have you been doing that?

A. Since 1936.

Q. What does the clerk do at the end of the four month period?

A. She is a married woman and goes back to her household duties.

Q. She just works January through May?

(Testimony of A. J. Goettsch.)

A. Yes.

Q. You finish packing in May and she has some work to do after that, clerical work?

A. Well, no. There are a few reports to make out after the 5th of June. That is, make up the bank balances and probably—but the time spent on that—

Q. Does she get paid by the hour or week?

A. By the month. [31]

Q. By the month? A. Yes.

Q. Would she be paid for the month of June?

A. About half a month.

Q. About half a month? A. Yes.

Q. When do you compute the percentages that you will give back?

A. After the annual audit by Mr. Watts.

Q. When is the annual audit?

A. Made after May 31st, as soon as the records are ready.

Q. Is that part of the work you will do?

A. Yes.

Q. And she will help prepare the checks and the bookkeeping necessary, won't she?

A. There is only a few minor details left after we close up.

Q. How many members do you have in the Association? A. 103.

Q. About 103? A. Yes.

Q. Is it growing—less or more than in the past years?

(Testimony of A. J. Goettsch.)

A. It is starting to grow again now that — I would [32] say it is an average of 103 for the past five years.

Mr. Winter: I think that is all.

Redirect Examination

By Mr. Fishburne:

Q. Will you tell us where the office is with reference to the packing—the place where the boxes of rhubarb are stored preliminary to shipment?

A. It is in the same building.

Q. It is in the same building?

A. Yes. There is just a partition between.

Q. How do you get from the place where the boxes are stored into the office; is there a door there?

A. There is a door through the partition.

Q. Is there a stairway?

A. No stairway. It is a single story building.

Q. All on one floor? A. That is right.

Q. As manager, do you ever do any loading?

A. No; no loading. Sometimes I do some receiving.

Q. You do receiving? A. Oh, yes.

Q. And what does that consist of?

A. Well, just taking the boxes off the truck and piling them on the platform.

Q. You still get paid as a manager? [33]

A. That is right.

Q. There is no distinction between your work when you work in the shed receiving boxes and do-

(Testimony of A. J. Goettsch.)

ing manual labor; there is no difference in your pay? A. Not a bit.

Q. You still get paid as manager of the Association? A. That is right.

Recross-Examination

By Mr. Winter:

Q. In your claimed refund you said not more than twenty-five per cent of your time was doing that; is that right? A. That is right.

Mr. Winter: That is all.

Mr. Fishburne: That is all.

The Court: That is all.

(Whereupon, the witness was excused.)

Mr. Fishburne: Mr. Watts. [34]

E. S. WATTS

called as a witness for and on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Fishburne:

Q. Give your name, please.

A. E. S. Watts.

Q. What is your business?

A. Certified Public Accountant.

Q. And as such have you been acquainted with the Sumner Rhubarb Association? A. Yes.

Q. For what period of time?

A. I think my period started about 1940.

(Testimony of E. S. Watts.)

Q. You kept the books for the Sumner Rhubarb Association from 1940 and are still keeping them?

A. No; I don't keep the books at all.

Q. You don't keep the books but you have audited their accounts? A. Yes.

Q. You have followed the history of this issue with the Government from, since you have been in there auditing the books?

A. I raised the issue.

Q. And you have a power of attorney? [35]

A. Yes.

Q. From the Sumner Rhubarb Association and have had for some time? A. Yes.

Q. And you raised the issue that is involved in this case? A. Yes.

Q. Then you are familiar with this Exhibit Number 1, addressed to you? A. Yes.

Q. Now you are familiar with the correspondence between the Government and yourself with reference to this issue?

A. I handled all the correspondence.

Q. Will you give to the Court from the beginning, as briefly as you can, the history of this issue?

Mr. Winter: We will object to it as irrelevant and immaterial.

The Court: I don't care to go into that. The Court has the responsibility irrespective of the attitudes of the enactor of this or the Commissioner of Internal Revenue. You might prove by this witness that these small payments were made by the Plain-

(Testimony of E. S. Watts.)

tiff cooperative association over its objections or with its approval. [36]

Q. (By Mr. Fishburne): Mr. Watts, the Social Security payments which are claimed here were made with or without your approval?

A. We stopped the filing of claims about 1944 as I remember, or 1945, and then from there on if any were made they were made with or under protest.

Q. And you have always—and you have made the claim for refund in each instance?

A. Yes. Or a claim for refund.

The Court: That includes the three years involved?

The Witness: Nothing has been paid since 1946 and only on the two office—officers or office employees.

Q. (By Mr. Fishburne): Now, the exemption which you claimed in 1940, was that—is that—the same exemption you are claiming under now?

Mr. Winter: Now, if the Court please—

The Court: He may answer. It might be material.

A. There was no claim made in 1940. If you are speaking for 1940. The claims were made in 1946 going back to 1942, or as far back as the statute of limitations would permit. Up to that time it was—they had established income tax exemptions in 1931 which prevailed but this last year when the Commissioner ruled that they were not exempt. [37]

(Testimony of E. S. Watts.)

He revoked, or attempted to revoke, the income tax exemptions because, as he says, we refused to file—

Mr. Winter: We will object to that.

Mr. Fishburne: I want the Court to get the picture.

The Court: I don't think the income tax controversy—

Mr. Fishburne: Why—

Q. (By Mr. Fishburne): What income tax would they have to pay, Mr. Watts?

A. None under the law.

The Court: Well, under the law, is it your contention that they must pay income tax?

The Witness: The Commission attempted to revoke the income tax exemptions.

The Court: On the grounds that this was not an agricultural cooperative?

The Witness: He says on the grounds that they refuse to furnish information and has made the revocation retroactive to January 1, 1939.

The Court: In Social Security, but income tax—

The Witness: It affects the Social Security tax because insofar as, if they are exempt under Section 101 (1) they are automatically exempt from Social Security Tax. If they are exempt under Section 101 (12), then they are [38] exempt from Social Security tax upon agricultural labor, but there is a question as to whether the other labor is a necessary adjunct to the operation.

(Testimony of E. S. Watts.)

Mr. Fishburne: That is what I wanted to get in the Court's mind. The distinction between those two. We claim both.

The Court: Well, the act that you have cited to me is the act dealing with Social Security tax as distinguished from income tax.

Mr. Fishburne: That is right.

Mr. Winter: 101?

The Court: Yes.

Mr. Winter: No. 101 is your statute dealing with income taxes, and the Social Security Act says that any corporation exempt from income taxes under 101 (1) is exempt from Social Security Tax; but any corporation exempt under Section 101 (12) is not exempt from income, from Social Security, tax; except where the wages are less than forty-five dollars a quarter. Where they are exempt as agricultural labor under the Social Security Act—

Mr. Fishburne: Now in that letter—

The Court: I would rather stay away from that letter. What I am trying to get clear—and we can make a quick disposition of this case—is this: Subsection 12 of Section 101 exempts from tax the following: Now what tax [39] is it, income or Social Security?

Mr. Winter: Income tax.

The Court: 101 (12) deals entirely with income tax?

Mr. Winter: That is right.

(Testimony of E. S. Watts.)

The Court: Well, clearly Plaintiff corporation is exempt from income tax.

Mr. Winter: The Social Security tax act does not refer to Section 101 (12). The only reference in Social Security tax is to Section 101 (1). In other words, the Social Security tax says if you are exempt under Section 101 (1), you are exempt from Social Security tax.

The Court: Then is this an agricultural or horticultural organization or a cooperative?

Mr. Winter: Or a cooperative.

The Court: Well, the statute uses the language organization. They might have an association or a cooperative or anything else and, if the answer to that is in the negative, then the employees if they otherwise meet the requirements of the statute can be subject to Social Security.

Mr. Winter: That is right.

The Court: If it is in the affirmative, that is the end of the case.

Mr. Winter: Then that is the end of the case.

The Court: I would like to hear from you, Mr. Winter, as to why it should not be in the affirmative.

Mr. Winter: Because it is not an association.

(Whereupon, the witness left the witness stand.)

The Court: I had no briefs in this case so that I am rather handicapped.

Mr. Winter: Your Honor has a ruling of the Commissioner that it is not exempt under 101 (1).

The Court: You don't mean to say——

Mr. Winter: Nor has it been granted exemption under 101 (12).

The Court: You don't mean to say that the Commissioner's ruling becomes the law of this Court.

Mr. Winter: No. But an agricultural corporation may be organized for profit and where its entire business would be agricultural you would have an association.

The Court: There is no issue here of this being an organization for profit.

Mr. Winter: No; but it certainly comes within 101 (12). It can't come under both.

The Court: There would be no reason in the world why it couldn't, as the Court reads that Act. 101 (1) is just a very general statement.

Mr. Winter: This is a corporation. It isn't an association. It is a corporation organized under the laws [41] of the State of Washington, and not an association. It couldn't come under 101 (1).

The Court: 101 (1) doesn't say so. It says organizations.

Mr. Winter: Organizations may mean anything. It may be a partnership. But, 101 (12) says farmers, fruit growers, or like associations, organized on a cooperative basis for the purpose of marketing products for producers and turning back to them proceeds from sales less marketing expense. That is exactly what it is.

The Court: But it goes further than that.

Mr. Winter: They have never exempted——

The Court: You are familiar with this and neither Mr. Fishburne or yourself furnished the Court with a brief. Agricultural workers were exempt from Social Security tax——

Mr. Winter: That is right.

The Court: But I haven't that statute before me. But, we get back to an examination of 101 (1) as to whether the bookkeeper and clerk were agricultural workers——

Mr. Winter: That is the sole issue in the case, it seems to me, and it is our position that regarding that — with respect to agricultural labor — under H——

The Court: What is the citation?

Mr. Winter: Your Honor?

The Court: Is there a law? [42]

Mr. Winter: That is the statute and the regulations——

The Court: Well, give me the section.

Mr. Winter: It is section 1607 (1) of the Act.

The Court: And what volume?

Mr. Winter: That is Title 26, your Honor. Title 26, Section 1607.

The Court: And what is this, agricultural labor?

Mr. Winter: Yes, your Honor.

Mr. Fishburne: Isn't that the section dealing with unemployment?

Mr. Winter: I have got the—that is—it is 1426 H of the Act, the same Title 26.

The Court: 1426?

Mr. Winter: H.

The Court: H?

Mr. Winter: The term agricultural labor includes all services performed on the farm in the employing of any person in connection with cultivating the soil or in connection with harvesting any——

Now, this wasn't on a farm. The labor wasn't performed on a farm. However, it was in connection with marketing so it comes under Section 1426 H (4) "in handling, planting, drying, picking, packing, packaging, processing, freezing, grading, storing or delivering to storage or to [43] markets or to a carrier for transportation to market, any agricultural or horticultural commodities but only if such service is performed as an incident to the ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits and vegetables for market."

It is the Government's position in these cases that the exemptions apply to all of the services necessary in handling the marketing of the product; the agricultural product. But, the employees in the office—the office employees are separate and are not within the exemptions and it is upon the taxpayer—as I pointed out in the Gaylord Guernsey Farms case it was held that some employees in repairing fences and the bookkeepers involved in that case were granted exemptions. However, they came under 1426 H 1. They were working on the tools and equipment within the farm that was necessary to produce the agricultural or dairy products. There

is a District Court case—Wilson Company v. United States. It is not officially reported; at least not at the time I got my citations. In the findings and conclusion of law entered April 13, 1948—well, in another case we lost a case with respect to the mechanics repairing milk trucks on the farm; and in Jones v. Geerny, the Government lost the case with respect to the service of the farmers for the maintenance of its tools [44] and equipment. But, it is our position, and sole position in this case, that it doesn't come within the handling and delivering and it is a separate occupation, and, therefore, doesn't come within the exemptions which have been granted or allowed in the Jones and Geerny.

The Court: Do you have anything, Mr. Fishburne? Do you have any citations?

Mr. Fishburne: I didn't think a brief was necessary.

The Court: It is highly necessary in any Internal Revenue case because the law is extremely complex and it is loaded with literally hundreds, if not thousands, of regulations that have qualifying effects and some of them are such as could well be questioned.

Mr. Winter: There is Larson v. Ives in 154 Federal 2nd.

The Court: I think I will take a short intermission. I want to reread these statutes that you have cited because the difficult situation that we have presented here is the involvement of the income tax and Social Security tax. Are you familiar with the case—

Mr. Winter: What case?

The Court: The case of Rucker——

Mr. Winter: I didn't hear.

The Court: Birmingham v. Rucker Breeding Farms. [45] It is a Circuit Court case.

Mr. Fishburne: 152 Federal 2nd 837; 63 Federal Supplement 779.

Mr. Winter: Yes. That is the case cited in there. The Eighth Circuit overruled that. And the Court pointed out that Congress, in defining agricultural labor, used advisedly the language 'service performed in connection with the hatching of poultry.' That is a different section than labor in handling and packing of fruit under 1426-A.

Mr. Fishburne: That is where we consider the government has been completely arbitrary. In connection with hatching poultry it is all right but in handling rhubarb it is a different case entirely. I can't follow the logic of the thing.

The Court: I think I will take a recess for ten minutes.

(Whereupon, at 11:30 o'clock a.m., a recess was had until 11:40 o'clock a.m., May 16, 1949, at which time the following proceedings were had, to-wit:)

The Court: Do you have anything further, Mr. Winter, that you want to suggest or offer to the Court?

Mr. Winter: I just wanted to give your Honor some citations as to bookkeepers and stenographers

which were held non-agricultural. In the Gaylord Guernsey Farms— [46] Federal 2nd—

The Court: What were the facts, briefly?

Mr. Winter: I think, as I recall the case, the Gaylord Guernsey Farms was a farmer or a corporation and they had bookkeepers and stenographers keeping the books and the exemption was granted to all the other employees including those who kept and built fences, but the Court expressly excluded the office operation or service in or about the farm as agricultural labor. In *Ives vs. Larson* it was held that clerical workers and employees who do no manual labor but are of a type having aptitudes quite apart from farm labor were not exempt.

And then there was the Conner case, v. U. S. in 52 Federal Supplement, at 223, a California case, decided by Judge McCulloch, District Judge. It involved taxes. However, between the years 1936 and 1939. The Court said—there were five cases—it quotes Gaylord Guernsey Farms in that.

The Court: That was a case determined before this Social Security Act was passed?

Mr. Winter: I beg your pardon?

The Court: That was a case determined before the Social Security Act was passed?

Mr. Winter: Oh, no. No. No.

The Court: The case was 1939? [47]

Mr. Winter: Yes, but Social Security went into effect in 1936. That was before the last amendment, and that was in 1939, with respect to farms.

The Court: Yes.

Mr. Winter: And the regulations I presume—the statute and regulations were amended. The pertinent part of Section 606, which amended the Social Security—I think I read that subdivision 4, which we contend was in the subdivision, was the “handling, planting, drying, picking, packing, packaging, processing, freezing, grading, storing or delivering to storage or to markets or to a carrier for transportation to market, any agricultural or horticultural commodities but only if such service is performed as an incident to the ordinary farming operations, or, in the case of fruits and vegetables, as an incident the preparation of such fruits and vegetables for market.” “The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.” “As used in this subsection, the term ‘farm’ includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms . . . ” and so on.

Those are all the cases I have, your Honor, on the subject and that is the position of the Commissioner and it has been his position since the amendments.

The Court: Well, the letter introduced in evidence, Mr. Winter, seems to at least leave the inference without too great a stretch of the imagination that the Commissioner was peaved because the Asso-

ciation hadn't responded to his request to bring themselves within the classification by his ruling.

Mr. Winter: That is only, your Honor, with respect to income tax.

The Court: Yes, but, of course, income tax likewise affects the Social Security tax.

Mr. Winter: There is only one section and that is a labor organization or a farmer organization such as the Granges.

The Court: I might have misread the letter but——

Mr. Winter: That is all the Commissioner has reference to. Now, your Honor, if this was a labor organization like the A. F. of L. or like the Grange, which is exempt from all taxation, then we have no question; but in order to claim an exemption they have got to show an exemption and all they have shown is that they are a cooperative marketing organization.

The Court: Then you concede they are exempt from income tax? [49]

Mr. Winter: Yes; that is right.

The Court: And then you concede that in this case, under the proof this morning, they are exempt from income tax?

Mr. Winter: Yes, on the proof they have made here I don't think there is any question about it. They are a cooperative marketing institution and they come exactly within the wording of 101 (12).

The Court: I think, Mr. Winter, I am prepared to make a disposition of this.

Mr. Winter: If your Honor holds that they are agricultural—I am wondering—if you hold they are exempt by 101 (1), I don't think there is any evidence that they are exempt under that Statute and entitled to exemption.

The Court: We have here the question for determination, as I understand it, whether or not this cooperative agricultural association was properly assessed for Social Security Tax upon two of its employees for a period of three years.

The amount involved is small but the principle, of course, is one that is of great importance, not only to the tax payer but to the Government in many other similar cases and it is for that reason that I was desirous of getting clearly in mind just what the issues are. [50]

This question of what constitutes agricultural labor has been troublesome since it was first written into the Act. Not only do you have the responsibility of its administration but the Courts in their determination have to decide what Congress meant. After the original enactment, it was sought to be clarified by the amendment.

There is no dispute now, however, as to the existing law and no dispute as to the facts in light of the record as here made and the facts clearly establish that here is an "organization" set up under the provisions of the laws of the State of Washington on a cooperative basis to deal with a single agricultural product, to-wit, rhubarb.

There might be some argument made as to

whether rhubarb is a fruit or a vegetable, but it certainly is one or the other. Some people might classify it one way and some another way.

The organizational set up is such that it will handle only the growers' products and not the product of anyone on the outside.

The central collection depot is provided where the grower, under the direction of the officers of the cooperative, packs his product to get certain standards, and then it is hauled in from the farms by employees of the cooperative and then shipped to places where it is [51] sold, and then by the buyer, I assume, distributed to the ultimate consumer.

The organization itself is a small membership in the neighborhood of one hundred growers. It is a seasonal operation continuing for a period of about four months in the year.

Aside from its officers, as provided for by its Articles of Incorporation, it has the employees that I have referred to who do the trucking and the hauling and the loading. And then it has the accounting employees. In this case there are two in number and they are working for a salary during this four month period which is involved in this controversy.

Now, when we turn to the law—and I am not going to cite numerous authorities because I haven't had an opportunity to run them down and rarely will you find authorities that have identical facts, and none of those are cited—this case, cited in 152 Federal 837, *Birmingham vs. Rucker Breeding*

Farms, which is a Court of Appeals case from the Eighth Circuit, more nearly fits our situation than any of the other citations; although it isn't squarely in point because the language is not comprehensive in the statutory definition of agricultural laborer. However, turning to that definition found in U.S.C., Title 26, Section 1426, sub-section H of sub-section 4, we have this language that is quite applicable to the problem now before us, and it reads as follows:

“The term agricultural labor includes all services in handling, planting, drying, picking, packing, packaging, processing, freezing, grading, storing or delivering to storage or to markets or to a carrier for transportation to market, any agricultural or horticultural commodities but only if such service is performed as an incident to the ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits and vegetables for market.”

The Government concedes here that everyone who participates in these activities in the time involved is within the exemptions that the Court read excepting the two individuals that I have referred to before, who kept the accounts and wrote the checks and looked after the finances and made the disbursements. It contends that they would not be persons who would be classified as being employed as incident to the preparation of such fruits and vegetables for market and, therefore, would not be exempt from Social Security Tax.

The Act that I have just read, standing alone, might not be sufficient to cover the situation so we refer to Title 26, Section 101, sub-division 1, and sub-division 12. The contention of the Plaintiff is that [53] these office employees fall under sub-division 1, which is a general definition, and the contention of the Government is that they fall under sub-division 12, and if they do fall under sub-division 12, then the Government should prevail here.

I am unable to determine that Congress could possibly have had in mind a distinction such as is sought to be made between this comprehensive language in sub-division 1, "labor—agricultural or horticultural," and sub-division 12.

There is no question at all in the mind of the Court that the record as here made brings this cooperative within the provisions of sub-section 12. But, by being brought within the language of that sub-section, I can not assume that they are excluded from the broader language of sub-section 1, which classifies the following organizations as exempt from taxation under this chapter, as being those that are labor organizations and agricultural or horticultural organizations.

We have here an agricultural organization; or, if you classify rhubarb as a fruit, it is a horticultural organization.

It is a cooperative.

Its function is not a profit making business.

The processing of this rhubarb, under the [54] cooperative's direction, is done on the farm and hauled to a central point and there distributed.

In order that it can function as a cooperative agricultural or horticultural organization, it must of necessity have someone employed to keep books and records.

I doubt that even in this small operation the bookkeeper and the accountant, or whatever their designations are, or whether the employee was actually handling crates of rhubarb, is important. It seems to this Court an absurdity that everybody identified with this farm marketing organization is exempt except those who kept the records and that they should be subject to tax.

I am convinced that the interpretation placed upon the language of the Act—and had there been any regulation that would seem to be contrary to the language of the Act, with all due respect for the Department, I would not feel warranted in following them—but I am convinced that the Internal Revenue Department did not have the full understanding of the operation of this organization, a cooperative association, or they would never have arrived at the conclusion which they did.

I suggested at the outset here, to counsel, that the letter from the Department introduced in evidence seemed to indicate some feeling on the part of some [55] employee of the Internal Revenue Department that because their demands had not been met and their commands had not been obeyed

they arbitrarily proceeded to assess the tax. But the Court was advised that this assessment dealt with income taxes rather than Social Security tax.

I appreciate that anyone who attacks anything concerning Federal taxes has the burden of proving their contention. The rule of construction is one of rather strict construction against the taxpayer, but this Court at any rate feels it is splitting hairs when you attempt to make a distinction between those absolutely essential employees who are engaged in the business of marketing for the members of the cooperative and those persons who keep the records.

I shall, therefore, find for the Plaintiff in the amount prayed for in the Complaint, and I will allow the Defendant—the Government—exceptions.

Mr. Winter: Your Honor, I am wondering, is your Honor finding that this corporation was exempt under Section 101 (1)?

The Court: Yes.

Mr. Winter: Would you make that finding, your Honor?

The Court: I thought I made it clear. It is exempt under 101 (1) and likewise under 101 (12); and [56] neither are exclusive of the other.

101 (1) is comprehensive enough to cover (12) and it is, therefore, exempt under 101 (1).

Mr. Winter: The point I was making is that such an exemption statute is strictly construed and I don't think there is any evidence that they are an association.

The Court: That is what we have been determining all morning.

Mr. Winter: In none of the cases that we have cited has any of those corporations ever been allowed any exemptions under 101 (1).

The Court: Well, this will be one case where they will be, so far as this Court has the responsibility of determining. The Appellate Court may take another view, however.

Mr. Winter: I wanted just to point it out, your Honor.

The Court: In order that you may have it clear, I think when you get a transcript of what I have just said you will find that I bring this within the provisions of 101 (1); that is, that it is an agricultural or horticultural organization; and then we go to the Social Security Tax that I referred to.

Mr. Fishburne: Which is 1426 (4). [57]

The Court: Yes.

Mr. Winter: I wonder if your Honor will make a finding—regulation number or section 402.208 (106) Federal Insurance Contribution Act—the regulation definitely excludes—does your Honor find that the regulation is invalid under the statute? Will your Honor make such a finding?

The Court: I don't know that I am called upon to find that the regulation is invalid. I find that a judicial interpretation of the statute—

Mr. Winter: Will you find as a matter of law that the regulation is invalid?

The Court: I don't think that I need to make that finding.

Mr. Winter: Well, your Honor said you were surprised that the Government would take such a position and it is a regulation since 1940.

The Court: I don't want to hold that the regulation is an invalid regulation. That might color instances where facts were substantially different from facts in this case, and that is the reason it would hardly be proper for a trial court to make such a holding, unless that was the only thing in issue. But, what has been brought to the attention of the Court here is an interpretation of the statutes themselves under the facts of this particular case and as I said at the outset this has always been a troublesome matter, this matter of what constitutes an agricultural worker.

Mr. Winter: We had it in the Colfax—I had two cases taken to the Circuit Court of Appeals, that involved workers in warehouses.

The Court: I wasn't influenced by any past legislative experience but I know how the exemptions got into the statute and the reason for it because it grew out of a situation in my own District.

If that is all now then, Court will be at recess until 10:00 o'clock tomorrow morning.

(Whereupon, at 12:10 o'clock p.m., May 16, 1949, hearing in this cause was completed.) [59]

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court, hereby certify that the foregoing is a true and correct transcript of the matters therein set forth.

EARL V. HALVORSON,
Official Reporter.

[Endorsed]: Filed Dec. 28, 1949.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO SUPPLEMENTAL RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the Motion of the Defendant-Appellant herein and the Order of the United States Court of Appeals for the Ninth Circuit (a copy of which was filed in the United States District Court for the Western District of Washington, Southern Division, on February 6, 1950), wherein the Clerk of the said District Court was directed to file in the said Circuit Court the complete stenographic transcript of the proceedings and testimony at the trial of the above entitled cause in the said District Court on May 16, 1949, I am transmitting herewith the official copy of the Court Reporter's Transcript of the Proceedings and Testimony at the trial of the above entitled cause

in the said District Court on May 16, 1949, and filed by the said Court Reporter in the office of the Clerk of the said District Court under date of December 28, 1949 as his official copy of the Transcript of the Records of the Proceedings and Testimony as aforementioned, and I do further certify that the said Transcript (consisting of pages numbered 1 to 60 inclusive) constitutes the Supplemental Record on Appeal in the above entitled cause.

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, Western District of Washington, this 8th day of February, 1950.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ E. E. REDMAYNE,
Deputy.

[Endorsed]: No. 12406. United States Court of Appeals for the Ninth Circuit. Clark Squire, Collector of Internal Revenue, Appellant, vs. Sumner Rhubarb Growers' Association, a Cooperative Agricultural Corporation, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed February 13, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

